In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-796

AMAREX, INC.,
Petitioner,

VERSUS

THE FEDERAL ENERGY REGULATORY COMMISSION AND ARKANSAS LOUISIANA GAS COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1979

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner Amarex, Inc. ("Amarex") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 17, 1979.

I.
OPINION OF THE COURT BELOW

The Opinion of the Court of Appeals is reported at 603 F.2d 127. A copy (Appendix A) is appended to this petition.

II.
JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1979. On August 27, 1979 the court denied a petition for rehearing and suggestion for rehearing en banc filed by Amarex. The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and 28 U.S.C. § 1254(1).

III.
QUESTIONS PRESENTED

1. Whether the opinion of the court below erroneously permits the Federal Energy Regulatory Commission (the "Commission") to require an initial dedication of natural gas to the interstate market pursuant to Section 7(b) of the Natural Gas Act.

2. Whether the opinion of the court below is in conflict with its own opinion in *Wessely Energy Corporation* v. *Arkansas Louisiana Gas Company and The Federal Energy Regulatory Commission*, 593 F.2d 917 (10th Cir. 1979) and with Opinions of the Third and Fifth Circuits.

IV.
STATUTES INVOLVED

The statute involved in this case is Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), which provides:

> *"Abandonment of facilities or services; approval of Commission*
>
> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

V.
STATEMENT OF THE CASE

A. Nature of the Case

This case involves the question of whether the Commission properly required an independent producer to sell natural gas in interstate commerce under Section 7(b) of the Natural Gas Act, as did the recent cases of *United Gas Pipe Line Co.* v. *McCombs*, 99 S.Ct. 2461 (1979) and *California* v. *Southland Royalty Company*, 436 U.S. 519 (1978). However, in this case, the Commission has not required the producer to *continue* deliveries of natural gas which have previously been commenced so as to prevent interstate supplies from being cut off, as it did in *McCombs* and *Southland*. Rather, the Commission has ordered a producer *initially* to sell gas in the interstate market, although the gas has not been previously sold in interstate commerce, and was not covered by the producer's certificate or contract with the interstate purchaser. The case therefore presents an important issue of whether the Commission has exceeded its authority by requiring an initial dedication of natural gas to the interstate market.

B. Facts

On January 15, 1970, Amarex acquired by assignment the lessee's interest in an oil and gas lease dated May 4, 1967 (the "1967 Lease") covering 160 acres of land located in Beckham County, Oklahoma. The 1967 Lease was for a primary term ending September 26, 1972, and so long thereafter as production continued. On June 6, 1970, Amarex and Arkansas Louisiana Gas Company ("Arkla") entered into a gas purchase contract (the "1970 Contract") providing for the sale to Arkla of natural gas produced under the terms of certain "Contract Leases" described in Exhibit A to the 1970 Contract covering more than 190,000 acres of land located in several counties in Oklahoma. The 1967 Lease was one of those "Contract Leases" described in Exhibit A. The 1970 Contract provided as follows:

"Section 2. Commitment

> (A) Subject to the further provisions hereof, [Amarex] hereby agrees to sell and deliver to [Arkla], and [Arkla] agrees to purchase and receive from [Amarex], the natural gas production attributable to [Amrex'] interest in all Contract Wells, and to that end [Amarex] hereby subjects and commits hereto the Contract Leases."

The 1970 Contract defined "Contract Leases" and "Contract Wells" as follows:

> "(F) 'Contract Leases' refers to the oil and gas leases and other mineral interests described in the schedule attached hereto and made part hereof as Exhibit A.
>
> "(G) 'Contract Wells' refers to all wells now or hereafter completed as commercially productive of natural gas on lands covered by the Contract Leases or on a production unit which includes any part of said lands."

On November 2, 1970, Amarex filed with the Commission an application for a small producer certificate pursuant to 18 C.F.R. § 157.40. On August 12, 1971, the Commission issued Amarex a small producer certificate in Docket No. CS71-92, effective upon the date of the filing of the application.

On September 26, 1972, the 1967 Lease expired by its own terms for failure to produce. Prior to the expiration of the 1967 Lease, production had commenced from leases covered by the 1970 Contract which were located in Stephens County, Oklahoma, approximately 120 miles to the southeast of the 1967 Lease.

On April 18, 1972, the same lessors granted to Amarex an oil and gas lease (the "1972 Lease") covering the same tract of land in Beckham County, Oklahoma, which had been covered by the 1967 Lease. The 1972 Lease was for a primary term of five years beginning September 26, 1972, and similarly provided that it would continue after the expiration of the primary term so long as oil and gas was produced.

On February 17, 1975, Amarex and others commenced the drilling of the Cupp "C" No. 1 Well in a drilling unit which included the 1972 Lease, which resulted in a productive gas well.

A dispute arose between Amarex and Arkla as to whether Arkla was entitled to purchase Amarex' interest in gas produced from the Cupp "C" well. Arkla commenced

taking gas from its producing affiliate which also owned an interest in the well, and other owners of the well commenced selling to other purchasers. Amarex, however, did not sell its share of gas to anyone.

C. Proceedings Before the Commission

On December 22, 1975, Arkla filed a complaint with the Commission alleging that Amarex' share of gas attributable to its interest in the Cupp "C" well was deliverable to Arkla under the 1970 Contract. On January 14, 1976, Amarex filed a petition for an order declaring that the 1972 Lease was not subject to the 1970 Contract. The Commission consolidated the two proceedings, and found that the question presented was solely a legal issue and that no factual hearing was therefore required.

On May 9, 1977, the Commission issued Opinion No. 798, appended hereto (Appendix C). The Commission's opinion was by a majority of three to one, Commissioner Watt dissenting. The Commission found, *inter alia,* that the 1972 Lease was dedicated to Arkla in interstate commerce, and ordered Amarex to commence deliveries to Arkla.

On rehearing, the Commission issued Opinion No. 798-A, appended hereto (Appendix B), in which the Commission permitted Amarex to deliver to Arkla, and ordered Arkla to purchase from Amarex, pursuant to a protective order, pending the outcome of this review. The protective order provided that deliveries thereunder did not constitute a dedication, and that if Amarex prevailed on judicial review, it would return the money received for the gas to Arkla, and Arkla would redeliver to Amarex the volumes taken. Otherwise, Opinion No. 798 was not changed.

D. Proceedings in the Court Below

Amarex petitioned the United States Court of Appeals for the Tenth Circuit for judicial review of the Commission's opinions pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). On July 17, 1979, the Court of Appeals entered an opinion and judgment affirming the Commission's orders. The Court of Appeals denied rehearing on August 27, 1979.

VI.
REASONS FOR GRANTING THE WRIT

A. The Opinion of the Court Below Erroneously Permits the Commission to Require Initial Dedications of Natural Gas to the Interstate Market.

This Court has established in the *CATCO* case, *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378 (1959), that the Commission has no authority to require a producer initially to dedicate its natural gas to the interstate market. However, voluntary initial service pursuant to a certificate dedicates all fields subject to that certificate. *United Gas Pipe Line Company* v. *McCombs,* 99 S.Ct. 2461 (1979). Where a field is dedicated, contractual provisions which would cut off deliveries of gas flowing in interstate commerce must yield to the authority of the Commission under Section 7(b) of the Natural Gas Act. *California* v. *Southland Royalty Company,* 436 U.S. 519 (1978).

Amarex submits that the gas involved in this case is not covered by the contract, and is not therefore subject to the certificate as was the case in *McCombs.* In addition, there is no contractual provision involved in this case which

would have the effect of cutting off supplies of natural gas flowing in interstate commerce as was the case in *Southland*. The Commission's order therefore requires a producer to make an initial dedication of natural gas to the interstate market, contrary to this Court's holding in *CATCO*.

The scope of a producer's dedication of natural gas to the interstate market, *i.e.*, what is dedicated, is determined by the terms of the gas purchase contract, as the contract may have been modified by a certificate of public convenience and necessity issued by the Commission under Section 7(c) of the Act. *Gulf Oil Corporation* v. *Federal Power Commission*, 563 F.2d 588 (3rd Cir. 1977), *cert. den.* 434 U.S. 1062, *reh. den.* 435 U.S. 981; *Vreeland* v. *Federal Power Commission*, 528 F.2d 1343 (5th Cir. 1976). In this case, the certificate issued by the Commission is a blanket small producer type of certificate which authorizes the producer to make any sale of natural gas for resale in interstate commerce, without regard to particular contract. 18 C.F.R. § 157.40. The certificate in this case therefore does not purport to modify the terms of the gas purchase contract, and that contract therefore determines the scope of the dedication.

The contract in this case covers only specifically described leases, and does not cover new leases which may be acquired by the producer after the expiration of the described leases. In this connection, the contract provides as follows:

> "(F) 'Contract Leases' refers to the oil and gas leases and other mineral interests described in the schedule attached hereto and made part hereof as Exhibit A."

The definition of "Contract Leases" as set forth above is very clear, and covers only those certain leases described in Exhibit A. The contract is therefore a single lease type, and all that Arkla obtained under the contract was a dedication of any gas found during the term of each of the described leases.

Where Arkla intends a dedication of after-acquired leases, other contracts in the record show that Arkla uses language as follows:

> "(F) *'Contract Leases'* refers to all oil and gas leases and other mineral interests now owned *or hereafter acquired* by Seller in Sections 35 and 36, Township 7 North, Range 17 East, Pittsburg County, Oklahoma." (Taken from Mobil Oil Corporation Rate Schedule No. 452 dated March 27, 1969. Emphasis added.)

The above quoted language, of course, is different from the language used in the contract in this case, for the reason that the above quoted language expressly covers leases ". . . hereafter acquired by Seller . . ." This provision is missing from the contract in the instant case, and it is very clear that the contract did not dedicate to Arkla leases acquired after the expiration of the leases described in the exhibit. Other examples of Arkla's after-acquired lease contracts appear in the record and were executed by Arkla both immediately before and immediately after the 1970 Contract.

It is therefore submitted that under the terms of the 1970 Contract, the 1972 Lease, which was acquired to commence after the expiration of the 1967 Lease, is not covered by the contract and is therefore not covered by this certificate. Gas produced from the Cupp "C" well is not

therefore produced from a field covered by the certificate. The Commission therefore exceeded its authority by directing Amarex to deliver this gas to Arkla in interstate commerce pursuant to Section 7(b) of the Natural Gas Act.

Neither does the Commission's order prevent supplies of natural gas flowing in interstate commerce upon which Arkla's customers have relied from being cut off, as in the *Southland* case. There is no contractual provision in this case which cuts off deliveries of gas flowing in interstate commerce. Rather, the contractual provision limits the initial dedication to certain "Contract Leases", and not any others which may be acquired after the leases covered by the contract expire. By no stretch of the imagination can this provision cause deliveries of gas to Arkla to be cut off.

In summary, the Court of Appeals' opinion extends this Court's holdings in the *McCombs* and *Southland* cases beyond the bounds of *CATCO*. The opinion of the Court of Appeals is therefore in error.

B. The Opinion of the Court Below Is in Conflict With the Court's Own Opinion in *Wessely Energy Corporation* v. *Arkansas Louisiana Gas Company and Federal Energy Regulatory Commission*, 593 F.2d 917 (10th Cir. 1979) and with Opinions of the Third and Fifth Circuits.

The Court of Appeals' opinion does not discuss or cite its opinion in *Wessely* which was issued shortly before the instant opinion and at the time constituted the most recent opinion of that Court of Appeals on the issue of dedications under the Natural Gas Act. The court's opinion in *Wessely* was issued by a different panel than that which decided this case, and is directly contrary to the opinion in this case.

The facts in *Wessely* are remarkably similar to the facts in the instant case, even down to the dates and identity of the gas purchaser. In October, 1971, Aquitaine entered into a gas purchase contract with Arkla and later commenced deliveries to Arkla under its gas purchase contract and small producer certificate from leases other than the one in question. Aquitaine's lease covering the tract in question expired for lack of production. The mineral owners executed a new lease on this tract, effective after the expiration of the Aquitaine lease, which was assigned to Wessely. Arkla contended that this lease was dedicated to it under the Natural Gas Act. The court held that Wessely's interest in the lease in question was not covered under the gas purchase contract, and that the lease was therefore not dedicated to Arkla although, as in this case, production had commenced from other tracts covered by the gas purchase contract.

The court's holding in the instant case is thus directly at odds with the court's holding in *Wessely*. In both cases, the lease in question was not covered by the contract. In both cases deliveries of natural gas in interstate commerce had commenced from other tracts during the term of a lease which expired because of lack of production on the tract concerned. Yet, in the one case, the court held that gas which is subsequently discovered is dedicated, while in the other case, the court held that it is not. The only discernible difference in these cases is that in the instant case, the identity of the lessee is the same, whereas in the *Wessely* case, there were different lessees. Yet this fact does not serve to distinguish the cases where, as here, the gas purchas contract did not cover the interest of the lessee under

the second lease. This fact puts the instant case on all fours with *Wessely*.

The opinion of the court below is also in conflict with other opinions of the Courts of Appeal for the Third and Fifth Circuits which properly determined the scope of the dedication by reference to the terms of the gas purchase contract. *Gulf Oil Corporation* v. *Federal Power Commission*, 563 F.2d 588 (3rd Circuit 1977), *cert. den.* 434 U.S. 1062, *reh. den.* 435 U.S. 981; *Vreeland* v. *Federal Power Commission*, 528 F.2d 1343 (5th Circuit 1976).

VII.
CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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November, 1979

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filing Stamp omitted in printing]

No. 77-1503

AMAREX, INC.,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION
(Successor to the Federal Power Commission),
Respondent,
ARKANSAS LOUISIANA GAS COMPANY,
Intervenor.

Petition for Review of Orders
of
The Federal Energy Regulatory Commission

Stanley L. Cunningham (Philip D. Hart, Terry R. Barrett, and McAfee, Taft, Mark, Bond, Rucks & Woodruff, a Professional Corporation, on the brief), for Petitioner.

McNeill Watkins II (Robert R. Nordhaus, General Counsel, and Philip R. Telleen, on the brief), for Respondent.

Glen W. Letham (Gilbert L. Hetherwick, Robert Roberts, Jr., Blanchard, Walker, O'Quin & Roberts, and Reuben Goldberg, Goldberg, Fieldman & Hjelmfelt, P.C., on the brief), for Intervenor.

James R. Patton, Jr. and David B. Robinson of Patton, Boggs & Blow, Washington, D.C. and Harry E. Barsh, Jr. of Camp, Carmouch, Palmer, Carwile & Barsh, Washington, D.C. filed briefs for the State of Louisiana, Amicus Curiae.

Before McWILLIAMS, BARRETT, and McKAY, Circuit Judges.

McWILLIAMS, Circuit Judge.

This case is a review of Opinion No. 798, as modified by Opinion No. 798-A, in which the Federal Power Commission, now the Federal Energy Regulatory Commission, directed Amarex, Inc., to deliver to Arkansas Louisiana Gas Company (Arkla) in interstate commerce natural gas attributable to Amarex's interest in a certain oil and gas lease relating to land situated in Beckham County, Oklahoma. The background facts are not in dispute, and will be fully set out below, as such are deemed to be quite significant.

On May 4, 1967, the First State Bank of Pittsburg (Kansas), as lessor, and Sinclair Oil & Gas Company, as lessee, entered into an oil and gas lease covering the SE¼ of Section 22, Township 10 North, Range 26 West, Beckham County, Oklahoma. The lease was to remain in force for a primary term ending September 26, 1972. On January 15, 1970, Amarex acquired by assignment Sinclair's interest in the 1967 lease. On June 6, 1970, Amarex and Arkla entered into a gas purchase contract providing for the sale to Arkla for a primary period of twenty years of natural gas produced under the terms of certain "contract leases" described in Exhibit A attached to the 1970 contract. The 1967 lease was one of the "Contract Leases" described in Exhibit A to the 1970 contract.

More specifically, the 1970 gas purchase contract between Amarex and Arkla provided as follows:

Section 2. Commitment

> (A) Subject to the further provisions hereof, [Amarex] hereby agrees to sell and deliver to [Arkla], and [Arkla] agrees to purchase and receive from [Amarex], the natural gas production attributable to [Amarex's] interest in all Contract Wells, and to that end [Amarex] hereby subjects and commits hereto the Contract Leases.

The 1970 contract defined "Contract Leases" and "Contract Wells" as follows:

> (F) "Contract Leases" refers to the oil and gas leases and other mineral interests described in the schedule attached hereto and made part hereof as Exhibit A.
>
> (G) "Contract Wells" refers to all wells now or hereafter completed as commercially productive of natural gas on lands covered by the Contract Leases or on a production unit which includes any part of said lands.

The 1970 contract further provided as follows:

> This contract shall be subject to all relevant present and future local, state and federal laws, and all rules, regulations, and orders of any regulatory authority having jurisdiction.

In November, 1970, Amarex filed with the Commission an application for a small producer certificate of public convenience and necessity. By virtue of a Commission order regarding small producers, Amarex was granted on August 12, 1971, a blanket certificate of "unlimited duration"[1] covering all of Amarex's sales and service in interstate commerce. The order granting the certificate provided, among other things, as follows:

> The grant of the certificates aforesaid for service to the particular customers involved shall not imply approval of all of the terms of the contracts, particularly as to the cessation of service upon the termination of

[1] The Commission in its opinion No. 798, concluded that the certificate was not limited in duration. See Sun Oil Co. v. F.P.C., 364 U.S. 170, 175 (1960). Amarex does not dispute this conclusion. Rather, it argues that the 1972 lease was not within the scope of the dedication.

said contracts as provided by Section 7(b) of the Natural Gas Act.

Amarex's service under the 1970 gas purchase contract commenced with initial deliveries to Arkla in November 1971 of gas from acreage described in the 1970 gas purchase contract, though not from the southeast quarter section covered by the 1967 lease. Amarex's lease interest in that quarter section expired by its own terms in September, 1972. Five months earlier, however, the lessors executed a new lease with Amarex covering the same quarter section for a period beginning on the expiration date of the 1967 lease and continuing for a primary term of five years. Prior to executing the 1972 lease, Amarex requested a title opinion, which read, in relevant part, as follows:

> By instrument dated June 6, 1970, Amarex, Inc. and Arkansas Louisiana Gas Company entered into a gas purchase contract covering the lease under consideration. The terms and conditions of the contract are not set forth in the instrument of record, but you are advised that any gas produced from the premises is subject to said contract.

Sometime prior to 1975, the aforesaid Section 22 was declared a drilling and spacing unit by the Oklahoma State Corporation Commission. In August, 1975, a commercially productive gas well was completed in the drilling unit which included the Southeast Quarter of Section 22.

When Amarex refused to comply with Arkla's request that gas attributable to Amarex's interest in the Southeast Quarter be delivered to Arkla, both parties commenced proceedings before the Commission. Arkla first filed a complaint asking the Commission to direct Amarex to deliver to Arkla the natural gas attributable to Amarex's oil and gas leasehold in the aforesaid Southeast Quarter. Amarex, in turn, filed with the Commission a petition for a declaratory order seeking a determination that Arkla was not entitled to the gas attributable to Amarex's leasehold.

The Commission found that no significant questions of fact were presented by either Amerax's petition or Arkla's complaint and directed the parties to file briefs addressing the legal issues involved. Because the petition and the complaint concerned the same factual situation, the two were consolidated.

By opinion No. 798 the Commission found that the public service obligation, imposed by Amarex's small producer certificate of public convenience and necessity and the terms of the 1970 gas purchase contract between Amarex and Arkla, applied to Amarex's leasehold interest in the Southeast Quarter and directed Amarex to deliver to Arkla any gas produced from or attributable to Amarex's interest in the Southeast Quarter for interstate transportation and sale.

By opinion No. 798-A the Commission denied Amerex's application for rehearing, but permitted Amarex to deliver gas to Arkla under a protective order, pending the outcome of judicial review of the Commission's order.

In our view California v. Southland Royalty Co., 436 U.S. 519 (1978) has great bearing on the present controversy. In *Southland*, the owners of certain acreage in Texas executed in 1925, an oil and gas lease which granted the lessee, Gulf Oil Corp., the exclusive right to produce and market oil and gas from the land for the next 50 years. The owners thereafter sold their remainder interest to Southland Royalty Co., and others. In 1951 the lessee contracted to sell casinghead gas from the leased property to El Paso Natural Gas Co., an interstate pipeline. Following the decision in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), the lessee applied for a certificate of public convenience and necessity from the Federal Power Commission authorizing its sale of gas to El Paso. The Commission granted the lessee a certificate of unlimited duration. The lessee in 1972 executed a second contract to sell El Paso Natural Gas Co. additional volumes of gas from the

leased premises, and obtained from the Commission in 1973 a certificate of unlimited duration for those volumes.

The original 50 year lease involved in *Southland* expired in 1975 and under local Texas law the lessee's interest in the remaining oil and gas reserves terminated and reverted to Southland Royalty Company and the other reversioners. Shortly prior to the expiration of the lease Southland agreed to sell the remaining casinghead gas to an intrastate purchaser at a higher price than El Paso Natural Gas Co. had been paying the lessee. It was in this setting that El Paso Natural Gas Co. filed a petition with the Commission seeking a determination that the remaining gas reserves in the leased property could not be diverted from it and into the intrastate market without abandonment authorization obtained pursuant to the provisions of the Natural Gas Act of 1938. 15 U.S.C. § 717 f(b). The Commission agreed with El Paso's contention on the ground that under the Natural Gas Act "service", once instituted, could not be abandoned without Commission permission and approval. On petition for review, the Court of Appeals for the Fifth Circuit reversed the Commission. Southland Royalty Co. v. F.P.C., 543 F.2d 1134 (5th Cir. 1976). In essence, the Court of Appeals held that the lessee for a term of years could not legally dedicate to interstate commerce the gas reserves remaining at the expiration of the lease period, since a lessee cannot "encumber that which it does not own."

The Supreme Court in *Southland* reversed the Court of Appeals and, in effect, upheld the Commission's decision. In so holding the Supreme Court described the Commission's position as follows:

> "In this litigation the Commission held that once gas began to flow in interstate commerce from a field subject to a certificate of unlimited duration, that flow could not be terminated unless the Commission authorized an abandonment of service. *The initiation of interstate service pursuant to the certificate dedicated all fields subject to that certificate.* The expiration of a lease on the field of gas did not affect the obligation to continue the flow of gas, a service obligation imposed by the Act." (Emphasis added.) 465 U.S. at 525.

In connection with the foregoing the Supreme Court held that the Commission's interpretation of the abandonment provision of the Natural Gas Act was a "permissible interpretation."

We recognize that *Southland* does not involve the precise question here presented. However, the Supreme Court's approval of the Commission's position in *Southland* that the service obligation attaches to "all fields subject to the certificate" certainly suggests that the Commission's position in the present case should be upheld. The underlying principles in *Southland* control the present controversy and in our view dictate affirmance of the Commission's order.

Southland, inter alia, stands for the following: (1) the initiation of interstate service pursuant to a certificate of public convenience and necessity dedicates all fields subject to that certificate; (2) once gas begins to flow in interstate commerce from a field subject to a certificate of unlimited duration, that flow cannot be terminated unless the Commission authorizes an abandonment of such service; and (3) the expiration of a lease on a field of gas does not affect the obligation to continue the flow of gas, a service obligation imposed by the Natural Gas Act.

Applying these principles to the facts of the instant case, we find: (1) when Amarex instituted delivery of gas to Arkla in November, 1971, pursuant to its gas purchase contract with Arkla and under the authority of its certificate of public convenience and necessity, such constituted a dedication of all fields subject to the contract and authorized by the certificate, which would include the gas reserves in the Southeast Quarter with which we are here

concerned; (2) gas having begun to flow in November, 1971, from a field subject to a certificate of unlimited duration, such flow could not thereafter be terminated unless the Commission authorized such; and (3) the expiration in September, 1972, of the 1967 oil and gas lease between Amarex and the First State Bank of Pittsburg did not affect the obligation to continue the flow of gas from the field subject to the gas purchase contract, since the service obligation is imposed by the Natural Gas Act independently of property law.

In our view Amarex is in a less favorable position than was Southland Royalty Company. Southland Royalty Company was not a party to the gas purchase contract sought to be enforced in *Southland,* nor had it been selling in interstate commerce pursuant to a certificate of public convenience and necessity. Such is not the present case. Amarex is a party to the gas purchase contract sought to be enforced by Arkla, and Amarex had been making interstate deliveries to Arkla pursuant to a certificate of public convenience and necessity. Southland Royalty Company was a stranger to the gas purchase contract and the certificate involved in *Southland.* Amarex is not a stranger to the gas purchase contract and certificate here involved. Rather, it is a party thereto.

In sum, the fact that Amarex's 1967 lease with the First State Bank of Pittsburg expired in 1972 does not affect the service obligation theretofore imposed on the gas reserves in that quarter section by the prior commencement of delivery under a gas purchase contract covering numerous leasehold interests, including that in the Southeast Quarter, which delivery was authorized by a certificate of unlimited duration granted Amarex by the Commission. Such follows from the teaching of *Southland. Southland* is but a logical extension of Sunray Mid-Continent Oil Co., 364 U.S. 137 (1960) and Sun Oil Co. v. Federal Power Commission, 364 U.S. 170 (1960), and we believe our disposition of the present case is in line with the rationale of *Southland* and those prior cases.[2]

The foregoing opinion was written prior to the recent opinion of the United States Supreme Court in United Gas Pipe Line Co. v. McCombs, 47 U.S.L.W. 4728 (U. S. June 18, 1978). We believe that *McCombs* fully supports the result reached in the present case.

The Opinion and Order of the Commission is affirmed.

NO. 77-1503 — AMAREX, INC. v. FERC

BARRETT, Circuit Judge, concurring:

I concur in the result reached based upon the facts herein. When Amarex renewed or "top leased" its expired oil and gas lease covering the same quarter section previously committed under the 1970 gas purchase contract, the properties were thus dedicated to the August 12, 1971, small producer certificate of public convenience and necessity. In legal effect, Amarex, upon renewal of the subject lease, became as much a "successor-in-interest" as Phillips did in Phillips Petroleum Co. v. Federal Power Commission, 556 F.2d 466 (10th Cir. 1977), thus binding the leasehold interest to the interstate dedication.

In all of the significant decisions upholding the Commission's determination that production is dedicated to the interstate market under a certificate of public convenience and necessity, notwithstanding the variations of factual and legal context, one basic, primary proposition controls, i.e., that there can be no withdrawal from the interstate dedication *once* gas flowed in interstate commerce. United Gas Pipe Line Company v. McCombs, Slip Opinion, Nos. 78-17 and 78-249 (Supreme Court of the United States, June 18,

[2] At oral argument it was agreed by all parties that the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350 (1978), does not affect this review.

1979); Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137 (1960); Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959); Phillips Petroleum Co. v. Federal Power Commission, *supra*.

In *United Gas Pipe Line, supra,* the Court stated that it was re-affirming its interpretation of the reach of §7(b) of the Act set forth in California v. Southland Royalty Co., 436 U.S. 519 (1978): That even expiration of the lease did not terminate the obligation to continue selling the gas (produced therefrom) in the interstate market.

In my view, *Southland* cannot be broadened beyond *United Gas Pipe Line Company,* et al., to include dedications beyond those lands included in oil and gas leases from which production was in fact realized and sold in the interstate market. References in the majority opinion to "fields" does, I believe, substantially broaden the reach of the Commission's regulatory power under §7(b) which is not warranted.

APPENDIX B

REHEARING

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III.

Arkansas Louisiana Gas Company	)	Docket No. CP76-220
	)	
v.	)	
	)	
Amarex, Inc.	)	
	)	
Amarex, Inc.	)	Docket No. CI76-346

OPINION NO. 798-A

OPINION AND ORDER DENYING REHEARING, GRANTING RECONSIDERATION AND MODIFYING OPINION NO. 798

(Issued July 1, 1977)

1. On June 1, 1977, Amarex, Inc. (Amarex) filed an application pursuant to Section 19(a) of the Natural Gas Act and §1.34 of the Commission's Rules of Practice and Procedure for rehearing of Opinion No. 798, issued May 9, 1977, in which the Commission ordered Amarex, commencing not later than 60 days from the date thereof, to deliver or cause to be delivered to Arkansas Louisiana Gas Company (Arkla) so much of the natural gas produced from the Helmerich & Payne Cupp "C" No. 1 Well, Beckham County, Oklahoma, as is sold by Amarex to Arkla pursuant to the terms of the Gas Purchase Contract between them dated June 6, 1970.

2. Amarex's application consists of thirteen lettered assignments of error and a number of lesser such assign-

ments thereunder. We have considered all of them and find that the assignments of error and grounds for rehearing set forth in its application present no facts or legal principals which would warrant any change in or modification of Opinion No. 798 and order issued May 9, 1977. While Amarex continues to advocate that oil and gas leases (contracts), and not acreage (and the minerals within the acreage), were the subject of the 1970 Gas Purchase Contract, it also refers (inconsistently) to a "well under the 1967 Lease."

3. On May 3, 1976, Amarex filed a motion seeking an order which would permit it to sell the natural gas in question to Arkla *pendente lite* under the 1970 Gas Purchase Contract, provided (1) such a sale *pendente lite* would not be an admission that the gas is covered by the contract or dedicated to Arkla in interstate commerce, (2) such a sale *pendente lite* would not operate as a dedication of the gas to interstate commerce and (3) Arkla would repay the gas in kind in the event that Amarex ultimately prevails. In other words, Amarex would sell the gas to Arkla under the terms of the 1970 Gas Purchase Contract so long as the *status quo* was maintained pending the outcome of this consolidated proceeding. Arkla, on May 17, 1976, filed an answer opposing the motion on the ground that the gas in question is dedicated to it under the 1970 Gas Purchase Contract and that it did not favor an interim arrangement with a repayment provision in view of its short supply. The Commission, as part of its order of July 15, 1976, denied Amarex's motion, and Amarex, on August 10, 1976, filed an application pursuant to Section 19(a) of the Natural Gas Act and §1.34 of the Commission's Rules of Practice and Procedure for rehearing of so much of that order as denied its motion to permit it to sell the gas to Arkla *pendente lite*. Thereafter, the Commission, by order issued September 9, 1976, granted rehearing for the purpose of further consideration, and in Opinion No. 798 found that Amarex's motion and application for rehearing were rendered moot by the action therein.

4. Amarex's application for rehearing filed June 1, 1977, includes a motion, pursuant to §1.12 of the Commission's Rules of Practice and Procedure, asking for reconsideration of so much of Opinion No. 798 as declares moot its earlier motion for interim relief, and/or a stay of the Commission's order to deliver or cause the gas to be delivered to Arkla. On June 15, 1977, Arkla filed an answer opposing Amarex's motion of June 1, 1977, and addressing principally the merits of a stay.

5. We would deny Amarex's motion insofar as it requests a stay of the Commission's order. Arkla is a regulated pipeline company with financial resources and natural gas reserves which are substantial in relation to the dollars and volumes involved herein. While admittedly gas is getting more difficult to purchase and comn.ensurately more expensive, we are not prepared to conclude in the absence of a special showing that Arkla cannot respond in money damages or replace the gas in kind and, if unable to replace the gas in kind, that Amarex would be irreparably injured by Arkla's inability to replace the gas.

6. Furthermore, Amarex's showing that it is likely to prevail on the merits upon judicial review, is not persuasive. Amarex correctly points out that the United States Court of Appeals for the Fifth Circuit, in *Southland Royalty Company, et al.* v. *Federal Power Commission,* 543 F.2d 1134 (1976), recently rejected certain aspects of the concept advocated by the Commission of the nature of extent of dedicated natural gas service. But, more recently, the United States Court of Appeals for the Tenth Circuit,[1] in *Phillips Petroleum Company* v. *Federal Power Commission,* ____ F.2d ____, (No. 76-1216, issued May 17, 1977), affirmed the Commission with respect to closely related aspects of that concept by equating ownership of a leasehold interest to own-

[1] The Tenth Circuit's jurisdiction includes the State of Oklahoma wherein the natural gas in question is situated.

ership of the gas in the ground. The Tenth Circuit distinguished *Southland*, stating,

> "*Southland* itself recognizes that a subsequent holder of mineral rights, who acquires such rights from a former holder who encumbered the estate, acquires it with all of the burdens validly created by his predecessor in interest."

And, still more recently, on June 27, 1977, the Supreme Court of the United States granted three petitions for writs of certiorari in *Southland*, thereby agreeing to review that decision.

7. Although we continue to believe that Amarex's motion for interim relief and its application for rehearing thereof were rendered moot by our final action in Opinion No. 798, nonetheless, upon reconsideration we find that pending the completion of judicial review the relief sought therein is the most appropriate course and will best serve the public interest.

8. If Amarex complies with Opinion No. 798 by delivering or causing the gas in question to be delivered to Arkla, and if a reviewing court ultimately concludes that Arkla is entitled to that gas, Arkla will not be harmed if we now protect Amarex in the manner requested in its motion for interim relief. But if a reviewing court ultimately concludes that Arkla is *not* entitled to the gas, the court would in all likelihood seek to make Amarex whole for complying with our misconception of the law in Opinion No. 798. And if the court should remand the proceeding it would be appropriate to correct our error of law by finding after due hearing pursuant to Section 7(b) of the Natural Gas Act that the present or future public convenience or necessity permit abandonment of Amarex's service in question to Arkla initiated in compliance with Opinion No. 798, and by ordering Arkla to respond in the nature of money damages or to repay the gas in kind.

9. Assuming that the gas in question is not dedicated to Arkla in interstate commerce, we choose to avoid a dedication which would be consummated by compliance with Opinion No. 798 and to provide for the more equitable remedy of repayment in kind by attaching the conditions which are set out herein. But assuming that the gas in question is so dedicated, we have authority under Section 7(b) of the Natural Gas Act to order Arkla to purchase it from Amarex under those conditions. *United Gas Pipeline Co.* v. *Federal Power Commission*, 385 U.S. 83 (1966). In other words, the conditions will cause no harm if Opinion No. 798 is upheld and will preserve the *status quo* if it is not upheld, obviating the need at a later time for relief to the same effect.

10. In the companion cases of *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137 (1960) and *Sun Oil Company* v. *Federal Power Commission*, 364 U.S. 170 (1960), the Supreme Court ratified the Commission's long standing view that an obligation to continue service arises under Section 7 of the Natural Gas Act, and that this obligation exists separate and apart from any contractual obligation to continue service and, therefore, outlasts the term of a contract to sell natural gas. The nature and extent of that statutory obligation have become subject to increasing controversy in recent years as the natural gas shortage has progressed and prices have risen. And we have become increasingly persuaded that the public interest would best be served by Supreme Court review of the scope of that statutory service obligation in the light of current problems, particularly, its relationship to the underlying oil and gas leases. As a result, we would urge speedy judicial review hereof so that the court's decision may be further reviewed with *Southland*.

The Commission orders:

(A) The application for rehearing of Opinion No. 798 filed by Amarex, Inc., on June 1, 1977, is denied.

(B) The motion filed by Amarex, Inc., on June 1, 1977, for reconsideration of so much of Opinion No. 798 as declares moot its motion for interim relief filed May 3, 1976, and/or a stay of Opinion No. 798, is granted to the extent that Opinion No. 798 is modified hereinbelow.

(C) The ordering paragraph of Opinion No. 798 is modified to read as follows:

"Commencing not later than ninety (90) days from the date of this opinion and order, Amarex, Inc., shall deliver or cause to be delivered to Arkansas Lousiana Gas Company, and Arkansas Lousiana Gas Company shall receive and take from Amarex, Inc., so much of the natural gas produced from the Helmerich & Payne Cupp "C" No. 1 Well, Beckham County, Oklahoma, from the completion thereof as a commercial producer of natural gas on August 21, 1975, forward, as is sold by Amarex, Inc., to Arkansas Louisana Gas Company pursuant to the terms of the Gas Purchase Contract between them dated June 6, 1970, *provided,* that pending the completion of judicial review compliance with this ordering paragraph will not be an admission that the gas is covered by the said Gas Purchase Contract or dedicated to Arkansas Louisiana Gas Company in interstate commerce, and will not operate as a dedication of the gas to interstate commerce, and *provided further*, that Arkansas Louisiana Gas Company will repay the gas in kind in the event that it is determined not to be entitled thereto upon the completion of judicial review."

By the Commission.
(S E A L)

Kenneth F. Plumb,
Secretary

APPENDIX C

CERTIFICATES (Small Producer)
LEASE TERMINATION

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III, and James G. Watt.

Arkansas Louisiana Gas Company	)	Docket No. CP76-220
	)	
v.	)	
	)	
Amarex, Inc.	)	
	)	
Amarex, Inc.	)	Docket No. CI76-346

OPINION NO. 798

OPINION AND ORDER
DIRECTING THE DELIVERY OF NATURAL GAS

(Issued May 9, 1977)

1. On December 22, 1975, Arkansas Louisiana Gas Company (Arkla) filed a complaint in Docket No. CP76-220 asking the Commission to direct Amarex, Inc. (Amarex) to deliver Amarex's share of the natural gas produced from the Helmerich & Payne Cupp "C" No. 1 Well, Beckham County, Oklahoma (the Cupp C No. 1 Well) to Arkla pursuant to a prior dedication of that gas to interstate commerce. On January 14, 1976, Amarex filed a petition in Docket No. CI76-346 for a declaratory order that the natural gas in question is not dedicated to Arkla in interstate commerce. The Commission, on January 29, 1976, transmitted a copy of Arkla's complaint to Amarex and gave and published notice of the commencement of both pro-

ceedings. On February 17, 1976, Amarex filed an answer to the complaint in which it admitted the allegations of fact but denied the conclusion that the gas in question is deliverable to Arkla, reasserted the allegations in its petition for declaratory relief, moved for consolidation of the two proceedings on the basis of identity of issues and moved, further, for a decision on the pleadings on the basis that there are no factual issues. On March 5, 1976, Arkla filed an answer and joined Amarex's motion insofar as it sought consolidation, but requested a hearing on the ground that "the issue presented in these proceedings may not be entirely a legal issue."

2. By order issued July 15, 1976, the Commission, among other matters, found that there are no factual issues, consolidated Docket Nos. CP76-220 and CI76-346 for the purpose of decision and set a briefing schedule for direct Commission decision. The record before us therefore consists of the pleadings (including the briefs) and the attached documents which have been filed in the respective dockets, together with the notices and orders which have been issued therein. Additionally, we take official notice of Docket No. CS71-92 which contains, among other matters, Amarex's application for the small producer certificate of public convenience and necessity pursuant to which the natural gas service involved herein is claimed by Arkla to have been certificated, as well as certain other documents as specified herein.

THE "DEDICATION"

3. On or about May 4, 1967, the First State Bank of Pittsburg, Pittsburg, Kansas, and Isadore E. De Lappe, as cotrustees of certain testamentary trusts, executed an oil and gas lease (the 1967 Lease) to Sinclair Oil & Gas Company (Sinclair) covering approximately 160 acres which are identified therein as "The Southeast Quarter (SE/4) in Section 22, Township 10N, Range 26W" situated in Beckham

County, Oklahoma,[1] for the term ending September 26, 1972, and as long thereafter as any of the products covered by the lease "is or can be produced." Among other matters, the lease authorized the unitization of the Southeast Quarter or any portion of it and provided, in this connection,

> "Any well drilled or operations conducted on any part of each such unit shall be considered a well drilled or operations conducted under this lease, and there shall be allocated to the portion of the above described land included in any such unit such proportion of the actual production from all wells on such unit as lessors' interest, if any, in such portion, computed on an acreage basis, bears to the entire acreage of such unit. And it is understood and agreed that the production so allocated shall be considered for all purposes, including the payment or delivery or royalty, to be the entire production from that portion of the above described land included in such unit in the same manner as though produced from the above described land under the terms of this lease."

In other words, unitization would transform the leasehold into an undivided part of a larger whole.[2]

4. Sinclair's interest in the 1967 Lease was assigned to Amarex on January 15, 1970, as part of an assignment of a large number of leases on that date. Thereafter, under a Gas Purchase Contract dated June 6, 1970 (the 1970 Gas Purchase Contract), Amarex agreed to sell and deliver to

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[1] For convenience and particularly to distinguish the acreage from other acreage with which it was unitized, "The Southeast Quarter (SE/4) in Section 22, Township 10N, Range 26W" will be referred to simply as the South*east* Quarter.

[2] The lease also provides, "All provisions hereof, express or implied, shall be subject to all federal and state laws and the orders, rules or regulations (and interpretations thereof) of all governmental agencies administering the same. . . ."

Arkla, and Arkla agreed to purchase and receive from Amarex "the natural gas production attributable to [Amarex's] interest in all Contract Wells, and to that end [Amarex] hereby subjects and commits hereto the Contract Leases" for the term ending on the 20th anniversary of the date of the first delivery from the subject properties.[3] The term, "'*Contract Wells*'," in the 1970 Gas Purchase Contract, "refers to all wells now or hereafter completed as commercially productive of natural gas on lands covered by the Contract Leases or on a production unit which includes any part of said lands," and the term, "'*Contract Leases*' refers to the oil and gas leases and other mineral interests described in the schedule attached hereto and made part hereof as Exhibit A."[4]

5. Pursuant to another agreement dated June 6, 1970, Amarex assigned a 25% interest in the Exhibit A Contract Leases, including the 1967 Lease, to Arkla Exploration Company (Arkla Exploration), an affiliate of Arkla.[5] And by agreement dated August 20, 1970,[6] Arkla Exploration agreed to sell and deliver to Arkla, and Arkla agreed to purchase and receive from Arkla Exploration, Arkla Exploration's "share of all production attributable to" the Exhibit A Contract Leases, including the 1967 Lease, "on the same terms and conditions" as under the 1970 Gas Purchase Contract.

[3] The earliest date on which the 1970 Gas Purchase Contract can expire according to its terms is November 4, 1991.

[4] Exhibit A consists of some 134 pages headed "Undeveloped Oil & Gas Leases". In view of the differences in the numbers of leases identified on each page, and the deletions and handwritten additions, an exact count of the number of leases embraced by Exhibit A has not been attempted. It appears, however, that at least 2,000 and probably not more than 3,000 leases, including the 1967 Lease, are so embraced by the 1970 Gas Purchase Contract.

[5] The agreement recites that Exhibit A covers approximately 290,000 net leasehold acres.

[6] The agreement dated August 20, 1970, is filed (insofar as it concerns Oklahoma acreage) as Arkla Exploration's FPC Gas Rate Schedule No. 29 and covers natural gas service which was certificated in Docket No. 72-81 by order issued March 27, 1972. Official notice is taken of the foregoing documents.

6. On November 2, 1970, Amarex filed an application in Docket No. CS71-92 pursuant to §157.40 of the Commission's Regulations under the Natural Gas Act for a small producer certificate of public convenience and necessity. By Order No. 428 issued March 18, 1971, the Commission amended §157.40 to provide in subsection (b) that such certificates would thereafter be blanket certificates covering existing and future jurisdictional sales.[7] And thereafter, by order issued in Docket No. CS71-92 on August 12, 1971, the Commission issued a blanket small producer certificate to Amarex (and to the applicants in numerous other dockets covered by the order) "authorizing the sale for resale and delivery of natural gas in interstate commerce by Applicants . . . as more fully described in the applications in this proceeding." The order also provides,

> "The grant of the certificates . . . shall not imply approval of all of the terms of the contracts, particularly as to the cessation of service upon the termination of said contracts as provided by Section 7(b) of the Natural Gas Act."

7. Deliveries of natural gas to Arkla pursuant to Amarex's certificate of public convenience and necessity in Docket No. CS71-92 commenced under the 1970 Gas Purchase Contract on November 4, 1971, from acreage other than the Southeast Quarter and, conversely, "no natural gas was ever produced under the terms of the 1967 Lease."[8] On or

[7] Official notice is taken of Order No. 428. The Commission indicated therein that pending applications would not have to be refiled under the amended regulation and, further, that "small producers shall be required to comply with Section 7(b) of the Act with respect to every small producer sale exempted herein."

[8] We read the foregoing statement in Amarex's initial brief as meaning that no natural gas was produced from the Southeast Quarter or from any production unit embracing any part of the Southeast Quarter dur-

about April 18, 1972, some five months before the primary term of the 1967 Lease was about to expire, The First State Bank of Pittsburg, Pittsburg, Kansas, and Isadore E. De Lappe, as co-trustees of the same testamentary trusts, executed an oil and gas lease (the 1972 Lease) of the Southeast Quarter to Amarex for a primary term of five years beginning September 26, 1972. The 1972 Lease is prepared on a more current revision of the form on which the 1967 Lease is prepared and contains provisions, including these pertaining to unitization, which are similar but not identical to those contained in the 1967 Lease. Furthermore, Amarex assigned a 25% interest in the 1972 Lease to Arkla Exploration pursuant to their agreement of June 6, 1970.

8. On February 17, 1975, Helmerich & Payne, as operator for Amarex and others, commenced drilling the Cupp C No. 1 Well in the Southwest Quarter in Section 22, Township 10N, Range 26W, Beckham County, Oklahoma (the South*west* Quarter), which apparently has not at any time been dedicated to interstate commerce, and the well was completed as a commercial producer of natural gas on August 21, 1975. The Southeast and Southwest Quarters, together with the other two quarters of Section 22, Township 10N, Range 26W, Beckham County, Oklahoma, have been designated as a 640 acre unit for the production of natural gas from the Cupp C No. 1 Well,[9] and the respective working interests attributable to the leaseholds embraced by

[8] (Continued)
ing the primary term of the 1967 Lease which ended September 26, 1972. But we believe that fact to be immaterial. Under the Commission's concept that the service in which the producer engages under the Natural Gas Act is distinct from the contract which regulates the producer's relationship with the pipeline company (which concept was ratified by the Supreme Court in *Sunray, infra*), the initiation of deliveries under the 1970 Gas Purchase Contract on November 4, 1971, effected a "dedication" of the natural gas reserves underlying all of the acreage described in Exhibit A to that contract.

[9] No information has been furnished as to when the production unit was formed.

that unit are committed for sale, and the production therefrom has been delivered (through the end of May 1976), as follows:

	Committed	Delivered[10]
To Michigan Wisconsin Pipe Line Company (interstate) —	36.42578%	76.5%
To Oklahoma Natural Gas Company (intrastate) —	38.57422	8.7
To Arkla (Arkla Exploration's interest — interstate) —	6.25000	14.8
In Dispute (Amarex's interest)—	18.75000	0.0
	100.00000%	100.0%

POSITIONS OF THE PARTIES

9. Amarex takes the position in its initial brief that its share of the natural gas produced from the Cupp C No. 1 Well is not dedicated to Arkla in interstate commerce because the 1972 Lease of the Southeast Quarter is not subject to the 1970 Gas Purchase Contract. Amarex asserts that it agreed to sell and deliver, and that Arkla agreed to purchase and receive, "the natural gas production attributable to [Amarex's] interest in all Contract Wells, and to that extent [*sic.*, end] hereby subjects and commits hereto the Contract Leases." The term "Contract Wells" refers to wells "on lands covered by the Contract Leases, Amarex argues, and no lands are covered by a lease after it expires. Furthermore, Amarex asserts, the term "Contract Leases" re-

[10] Although Amarex contends that Arkla is taking delivery of that part of Amarex's interest which exceeds Arkla's 6.25% interest, Arkla responds that its overtakes are within the parameters of the industry practice of balancing new wells pending the marketing of all fractional interests and the development of delivery patterns. Payments due Amarex from Arkla are being held in a suspense account pending resolution of the controversy and a final accounting of the volumes of gas.

fers to those which are described in Exhibit A, and since the latter document refers to the lease of the Southeast Quarter in terms of both a lease number and an expiration date it is clear that the 1967 Lease, and not the 1972 Lease, was dedicated to the 1970 Gas Purchase Contract. And finally, Amarex argues, there is no provision in the 1970 Gas Purchase Contract for the inclusion of after-acquired leases as in the case of certain other gas purchase contracts between Arkla and various producers, copies of the pertinent portions of which are attached to Amarex's initial brief.

10. Arkla, in its initial brief, takes the opposite position that Amarex's interest in the natural gas produced from the Cupp C No. 1 Well is dedicated to it in interstate commerce and, as a result, that dedicated supply cannot be withdrawn from interstate commerce without Commission approval. Among other court decisions, it relies, in this connection, upon *The Atlantic Refining Co., et al.* v. *Public Service Commission of the State of New York, et al.*, 360 U.S. 378 (1959) (known as the *CATCO* decision) and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137 (1960). Furthermore Arkla relies on *Pioneer Gathering System, Inc., et al.*, 23 FPC 261, 263 (1960), *Cumberland Natural Gas Company, Inc., et al.*, 34 FPC 132, 137 (1965), *Mitchell Energy Corporation*, ... FPC ....., (Opinion No. 733) (1975)[11] and *United Gas Pipe Line Co.* v. *Billy J. McCombs, et al.*, ... FPC ..... (Opinion No. 740) (1975)[12] for the proposition that the dedication which is consummated by the initiation of deliveries under a cer-

[11] Affirmed, *Mitchell Energy Corporation* v. *Federal Power Commission*, ... F.2d ..... (No. 75-3110) (CA5, 1976).

[12] Reversed on other grounds October 18, 1976, *sub nom Billy J. McCombs, et al.* v. *Federal Power Commission*, No. 75-1829, CA10. Petition for rehearing pending. Arkla cites this case for the additional proposition that the share of production which is attributable to the Southeast Quarter is part of the dedicated gas supply even though the Cupp C No. 1 Well is completed on undedicated acreage.

tificated gas purchase contract includes all of the acreage which is described in the contract, whether proven or unproven, and whether connected to interstate transportation facilities or not so connected. Accordingly, Arkla asserts that the commencement of deliveries to it on November 4, 1971, consummated the dedication to it in interstate commerce of all of the acreage which is described in the 1970 Gas Purchase Contract.[13]

11. Turning to the question of the expiration of the 1967 Lease, Arkla relies on *El Paso Natural Gas Company, et al.*, ... FPC ....., (Opinion No. 737) (1975),[14] wherein the Commission said that "it makes no difference whether a lease is transferred or terminates, the obligation of service imposed upon the dedicated gas continues." Arkla asserts, in this connection, that the Supreme Court in *Sunray, supra*, ratified the Commission's long standing view that an obligation to continue service arises under Section 7 of the Natural Gas Act, and that this obligation exists separate and apart from any contractual obligation to continue service and, therefore, outlasts the term of a contract to sell natural gas. Furthermore, Arkla adds, the statutory obligation to continue service exists both as to contracts for the sale of natural gas and as to the underlying leases, termination of which may impair the obligation of the contract but not the separate and distinct statutory obligation to continue service. Amarex has made no showing to justify abandonment, Arkla concludes, and consequently the Com-

[13] Arkla points out that, referring to *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954), the United States Court of Appeals for the Third Circuit said in *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F.2d 550, 558 (1956),

> "We think the sense of the Phillips decision is altogether opposed to permitting the Commission's control of sales to be nullified by the independent producer's abandonment of those sales at will."

[14] Reversed December 13, 1976, *sub nom Southland Royalty Company et al.* v. *Federal Power Commission*, Nos. 75-3373, *et al.*, CA5. See discussion, *infra*.

mission should direct Amarex to commence deliveries to it immediately in accordance with the dedication.[15]

12. Although the Commission staff did not file an initial brief, it filed a reply brief in which it asserts that Amarex's presentation of the issue finesses the critical question of whether the expiration of the 1967 Lease terminated the dedication to Arkla of the natural gas reserves underlying (and/or attributable to) the Southeast Quarter.

> "Once it is determined that the 1967 lease reserves were dedicated to the 1970 contract and since no abandonment has been authorized under Section 7(b) of the Natural Gas Act, it is simply irrelevant that the subject reserves are now covered by a 1972 lease that was executed after the 1970 contract. Amarex dedicated the subject reserves to the 1970 contract and now that those supplies are being produced from the Cupp C No. 1 Well, Arkla is clearly entitled to the share of production allocated to the reserves committed by Amarex under the 1967 lease to the 1970 contract."

13. Amarex, in its reply brief, attempts to clarify certain statements in Arkla's initial brief; continues to argue that the 1972 Lease is not dedicated to the 1970 Gas Purchase Contract; and asserts that Arkla, by its silence with respect to that issue, concedes "an essential element of" Amarex's case, "for unless the 1972 Lease is covered by the 1970 [Gas Purchase] Contract, there can be no dedication of that lease to interstate use." Amarex cites numerous Commission decisions to the effect that dedication is to be determined by the terms of the contract, and it would distinguish

[15] While Arkla also asks for restitution, Amarex has not on this record received any of its entitlement attributable to the Cupp C No. 1 Well. Without discoursing this subject further, the sense of the Ordering Paragraph is to require Amarex to deliver or cause delivery to Arkla of Amarex's share of the production from that well from August 21, 1975, on which date it was completed as a commercial producer of natural gas, forward.

El Paso, supra, on the ground that the 1972 Lease is not covered by the 1970 Gas Purchase Contract and, consequently, "the public has not relied on gas which may be produced by virtue of the 1972 Lease." And the Commission's application of *El Paso, supra*, to the present situation, Amarex urges, would invade the integrity of State recording acts by which bona fide purchasers take free and clear of unrecorded encumbrances, and would also violate the public policy against perpetuities insofar as rights created by Section 7(b) may vest at remote times in the future.

14. And Arkla, in its reply brief, asserts that Amarex dedicated the natural gas production attributable to Amarex's interest in Contract Wells which, in turn, are wells *on lands* covered by the Contract Leases or on production units which include any part of said *lands*. The reference to Contract Leases, Arkla argues, serves only to identify the acreage, as is evidenced by the fact that the term "Contract Leases" includes both the "oil and gas leases" and the "other mineral interests" described in Exhibit A and the "mineral interests," Arkla continues to argue, are not limited in duration as in the case of the "oil and gas leases." The Cupp C No. 1 Well is completed on a production unit which includes the Southeast Quarter which, in turn, is acreage described in Exhibit A to the 1970 Gas Purchase Contract and is, therefore, a Contract Well, Arkla concludes.[16]

THE DECISION

15. While Amarex expresses its position in terms of the non-dedication of a particular lease, and Arkla asserts its claim in terms of the dedication of particular acreage and/or the natural gas reserves underlying the acreage, the

[16] Arkla asserts, additionally, that expiration dates of leases are shown on Exhibit A because it was prepared for attachment to the agreement of June 6, 1970, by which Amarex sold a 25% interest in the leases to Arkla Exploration, as well as for attachment to the 1970 Gas Purchase Contract.

Natural Gas Act establishes no procedures by which leases, acreage or reserves, or anything else, for that matter, can be dedicated to interstate commerce. Section 7 of that Act establishes, instead, a procedure for certification, wherein subsection (c) provides in pertinent part,

> "No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions, thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . ."

and subsection (e) provides, also in pertinent part,

> ". . . [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity. . . ."

16. Accordingly, while the Natural Gas Act is not couched in terms of dedication to interstate commerce, it does establish a procedure by which the Commission can certificate sales of natural gas in interstate commerce and, as the Supreme Court found in *Sunray, supra,*[17] the natural gas service which a particular sale initiates. Once the service is certificated, and the certificate is accepted and the service

[17] 364 U.S., at pages 147 to 151.

initiated, the service may not thereafter be discontinued without the permission and approval of the Commission under subsection (b) of Section 7 which provides,

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

17. The status of natural gas service as being terminable, lawfully, only through such Section 7(b) permission and approval, is commonly expressed in terms of particular leases being dedicated to interstate commerce, or in terms of the leaseholds or acreage covered by the leases as being so dedicated, or in terms of the underlying reserves or gas supply as being so dedicated. In other words, the term "dedicated" is commonly used by the natural gas industry and the Commission, as well as by the courts, to express the existence of that legal status. But, as the arguments of Amarex and Arkla demonstrate in this instance, the existence of the legal relationship known as "dedication" must be determined on a case by case basis.

18. In order to determine which of the parties is entitled to receive the natural gas from the well in question, we must look to the parameters of the certificated service as they are revealed by the documents through which it was initiated. To that end we turn to the application which Amarex filed in Docket No. CS71-92 for the small producer certificate of public convenience and necessity authorizing it to initiate the service in question, and the Commission's order of August 12, 1971, granting the application and issuing the certificate. *United Gas Pipe Line Company* v. *Billy*

J. McCombs, et al., supra. And we focus on the question of whether the certificated service, or any part of it, is limited in its duration.

19. In looking to Amarex's application in Docket No. CS71-92 and the Commission's order of August 12, 1971, granting the application, we are guided by the Supreme Court's statement in *Sun Oil Company* v. *Federal Power Commission,* 364 U.S. 170, 175 (1960):

> "[W]e agree with the Commission that the 1956 certificate was a permanent one. The application itself, under the construction we have given the statute in *Sunray,* did not with any explicitness ask for a limited certificate. It asked for one 'authorizing the sale of natural gas' under the 1947 contract; but as we said in *Sunray,* a permanent certificate would do that. . . . And the certificate issued makes no reference to any limitation of time. This is in contrast with explicit references to the limitation in those instances where the Commission had previously issued term certificates. [Footnote omitted.] The Commission's order, which blanketed the many applications before it in the mass proceeding, is no more explicit about limitation than the application, and refers, in fact, to the certificate as both 'authorizing the sale' of natural gas, and authorizing a 'service,' which accords with our construction of §7(e) in *Sunray.* Under these circumstances we would hardly see any basis for overturning the Commission's view that no limitation as to time was implied."

20. Upon reviewing in their entireties Amarex's application for the certificate and the Commission's order issuing the certificate, we find nothing to suggest that Amarex was then seeking or that the Commission was then issuing a certificate which would be limited in its duration either with respect to the entire panorama of Amarex's service or with respect to any part of its service. And we find that no limitation in the duration of Amarex's service or any

part of its service, including its service from or attributable to any one property and its service from any one gas producing well, was implied.

21. Turning to the 1970 Gas Purchase Contract, we find no suggestion of any limitation in the duration of any part of the certificated service which was initiated pursuant thereto[18] other than the possible limitation advocated by Amarex which is inherent in the expiration of a fixed term oil and gas lease. We believe, to the contrary, that unless there is a specific exercise of the Commission's abandonment authority under Section 7(b) of the Natural Gas Act in the order granting a certificate under which a sale is initiated, as where abandonment is authorized prospectively in the case of a limited term certificate, limitations of time in a gas purchase contract and in the underlying leases should not operate as limitations in the duration of the certificated service.[19]

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[18] Although a limitation in the duration of natural gas service pursuant to the 1970 Gas Purchase Contract would not have the legal effect of limiting the duration of Amarex's service under its small producer certificate (*Sunray* and *Sun Oil, supra*), it is the sense of this and the following three paragraphs that when the 1970 Gas Purchase Contract and the 1967 Lease are viewed against the background of the principal court and Commission decisions pertaining to the duration and other parameters of certificated service, those documents are consistent with the unlimited duration of the service embraced by Amarex's small producer certificate as found in the preceding paragraph.

[19] As noted, the Commission's order of August 12, 1971, issuing the small producer certificate in question, states in furtherance of *Sunray* and *Sun Oil, supra,* that the grant of the certificate shall not imply approval of the terms relating to the cessation of service upon the termination of a contract. Since service under the 1970 Gas Purchase Contract is dependent upon service from the underlying leases, we believe that *Sunray* and *Sun Oil, supra,* should apply to the leases underlying the 1970 Gas Purchase Contract, as well as to that contract itself. In other words, we would not imply from the primary term of the 1967 Lease any limitation in the duration of the natural gas service from or attributable to that lease. Such service should be limited in its duration only by an express grant of abandonment authorization pursuant to Section 7(b), either prospectively as in the

22. As Arkla points out in its reply brief, and there is merit in its argument, the term "Contract Leases" refers to both the "oil and gas leases" and to the "other mineral interests" which are described in Exhibit A; and since the "other mineral interests" do not have an inherent time limitation as in the case of the "oil and gas leases", the descriptions in Exhibit A are identifications of particular acreage (embracing both the "oil and gas leases" and the "other mineral interests") rather than identifications of particular leasehold tenures (embracing only the "oil and gas leases"). We would add that such a construction is reinforced by the fact that the term "Contract Leases" is defined by reference to the word "leases" (as well as to "interests"); and while the word "leases" can refer to specialized contracts pertaining to land and interests in land, the word "leases" can also refer to the land or interests in land which are the subject of the specialized contracts. And the latter is a less strained and more natural construction in the light of the reference to "other mineral interests". To construe the term "Contract Leases" as identifying particular leasehold tenures, as Amarex contends, would clear the way "for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market." *Sunray, supra*, 364 U.S., at page 142.

23. Furthermore, we find no suggestion in the 1967 Lease that natural gas service from the Southeast Quarter, or

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[19] (Continued)
case of a limited term certificate, which was not done in this case, or subsequently. And our construction, *infra*, of the 1967 Lease in a manner which is consistent with our foregoing views is facilitated by the provisions in both leases to the effect that all of their provisions, express or implied, are subject to the Natural Gas Act and to the orders, rules or regulations (and interpretations thereof) of the Commission.

from a production unit embracing the Southeast Quarter, commenced after the expiration of the primary term of that lease, should not be included in the service which was certificated in Docket No. CS71-92 and initiated on November 4, 1971. The Supreme Court said in *Sunray, supra* (364 U.S., at page 156), quoting in part from *CATCO, supra,*

> "An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. . . .'"

The Commission elaborated upon the parameters of that dedicated supply in *Pioneer* and *Cumberland, supra,* indicating that the commencement of service from any of the acreage described in a gas purchase contract commits all of the acreage described therein to the service, whether proven or unproven, and whether connected to interstate transportation facilities or not so connected. *CATCO, Sunray, Pioneer* and *Cumberland, supra,* all predated the 1967 Lease which, as noted, states that all of its provisions, "express or implied, shall be subject to all federal and state laws and the orders, rules, or regulations (and interpretations thereof) of all governmental agencies administering the same. . . ." Given this background and the foregoing lease provision, Amarex cannot complain that the natural gas service from the Southeast Quarter, or from a production unit embracing the Southeast Quarter, was committed to interstate use by reason of production elsewhere as distinguished from production from or attributable to the Southeast Quarter.

24. From the foregoing, we find and conclude that no limitation in the duration of Amarex's service or any part of its service initiated pursuant to the 1970 Gas Purchase Con-

tract under its blanket small producer certificate of public convenience and necessity issued in Docket No. CS71-92 is to be found in or implied from the 1970 Gas Purchase Contract or the 1967 Lease. We find, further, that Amarex's said certificate embraces all of the natural gas production from or attributable to the acreage which is identified in Exhibit A as being subject to the 1970 Gas Purchase Contract including, without limitation, the Southeast Quarter.

25. We turn, then, to the further question of the effect, if any, of the expiration of the primary term of the 1967 Lease on the certificated service. And we find that on December 13, 1976, while this consolidated proceeding was pending before us for decision, the United States Court of Appeals for the Fifth Circuit reversed our decision in *El Paso, supra, sub nom Southland Royalty Company, et al* v. *Federal Power Commission*, 543 F.2d 1134, characterizing the principal issue as one of "property rights vs. regulatory powers":

> "Does the lessee under a 50-year fixed-term mineral lease, by making certificated sales of leasehold natural gas in interstate commerce, thereby dedicate to interstate commerce the gas which remains in the ground at the end of the 50th year?"

The Fifth Circuit answered the question which it thus framed in the negative, rationalizing that under Texas law pertaining to real property "a person holding a present interest in real property which is limited in duration cannot create an estate which will extend beyond the term of his interest."[20]

[20] Petitions for writs of certiorari were filed in the Supreme Court of the United States by the State of California on February 12, 1977 (No. 76-1114), and by El Paso Natural Gas Company on February 16, 1977 (No. 76-1133), and will soon be filed by this Commission.

26. We are gravely concerned that the Fifth Circuit's decision in *Southland* may open the floodgates of deregulation contrary to the public interest. In recent years the growth of the free or intrastate market for natural gas has effectively eroded the Commission's ability to regulate the price of natural gas flowing in the interstate market. But the Commission has been able to maintain the flow, principally because its Section 7(b) dike stood sacrosanct against the eroding forces of the intrastate market and would not permit natural gas service to be terminated without the Commission's permission and approval. The first breach in that dike appeared on October 18, 1976, when the United States Court of Appeals for the Tenth Circuit held in *McCombs, supra,* that a *de facto* abandonment had occurred without the required statutory hearing and finding by the Commission. And two months later *Southland* revealed the course by which that trickle could develop into a significant flow and thereby undermine the integrity of Section 7(b) if that dike is not now plugged by judicial or legislative action.

27. In *Sunray* the Supreme Court ratified the Commission's long standing view that an obligation to continue service exists under Section 7 of the Natural Gas Act, and that such obligation is separate and apart from any contractual obligation to continue service. If, therefore, a gas purchase contract should expire or otherwise terminate, that separate statutory obligation would require the service to be continued until we permit and approve its termination. The gas consuming public will be able to rely on that service obligation so long as all or substantially all of the oil and gas leases used by the natural gas industry continue to provide in their habendum clauses that the leases shall remain in force for the life of the underlying reserves. But should the natural gas industry gradually change to fixed term leases in the light of *Southland,* and particularly if the industry should change to short term leases on a universal or quasi-universal basis, the statutory service obligation could be circumvented through the terminations of the oil

and gas leases underlying that obligation. The gas could be lost to those who had been dependent on it, and our ability to carry out our mission to regulate the price of natural gas flowing in the interstate market would be eroded further, possibly to the point of deregulation, because we could not require the flow to be maintained.

28. If there is a separate statutory service obligation, as the Supreme Court has confirmed in *Sunray*, why should it not apply to the oil and gas leases underlying gas purchase contracts, as well as to the contracts themselves, to the end that the integrity of that service would be maintained? The Fifth Circuit responds in *Southland* that one having an interest in real property which is limited in time cannot create an estate which will extend beyond the term of his interest. But that rationale does not address the fact that the interest which is limited in time was created by an oil and gas lease, and that an oil and gas lease, like a gas purchase contract, is a specialized form of contract. And the Fifth Circuit would leave us on a carousel on which we find that the statutory service obligation will survive the term of a gas purchase contract but cannot survive the term of an oil and gas lease underlying that contract.

29. If it is "black letter law" that one having an interest in real property which is limited in time cannot create an estate which will extend beond the term of his interest", so, too, it is the law of the land that the Natural Gas Act, as expressed in Section 1(b), applies "to the sale in interstate commerce of natural gas for resale for ultimate public consumption". In *Interstate Natural Gas Co., Inc.* v. *Federal Power Commission*, 331 U.S. 682 (1947), in which the Commission's jurisdiction to regulate intrastate (field) sales of natural gas for eventual interstate consumption was unsuccessfully challenged, the Supreme Court said, at pages 692 and 693,

> "We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predominantly a matter of national as contrasted to local concern. All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed." (Footnote omitted).

And in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), the Supreme Court quoted the foregoing with approval and added, at page 681:

> "The *Interstate* case is . . . said to be distinguishable in that it did not involve an asserted conflict with state regulation, and federal control was not opposed by the state authorities, while in the instant case there are said to be conflicting state regulations, and federal jurisdiction is vigorously opposed by the producing states. The short answer to this contention is that the jurisdiction of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control."

And the Supreme Court added, further, at pages 682 to 684:

> "There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business. A significant part of this gap was created by cases holding that 'the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States.' *Interstate Natural Gas Co.* v.

Federal Power Commission, supra, at 689. The Committee reports on the bill that became the Natural Gas Act specifically referred to two of these cases and to the necessity of federal regulation to occupy the hiatus created by them. Thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems." (Footnotes omitted.)

30. As a result of these decisions, we believe that any conflicts between the "black letter law" on which the Fifth Circuit relies in *Southland,* and the Natural Gas Act, must be resolved in favor of the latter and the service obligation which it creates, particularly where a lease, such as the 1967 Lease, unlike those in *Southland,*[21] declares,

> "All provisions hereof, express or implied, shall be subject to all federal and state laws and the orders, rules, or regulations (and interpretations thereof) of all governmental bodies administering the same. . . ."

And whether or not a lease contains such a provision, we believe that anyone who entered into an oil and gas lease on or after June 21, 1938, which is the date on which the Natural Gas Act was approved, and, in any event, on or after June 7, 1954, which is the date on which the Supreme Court held in *Phillips* that independent producers of natural gas are subject to regulation under the Natural Gas Act, did so, and anyone who now enters into such a lease, does so, with actual or constructive knowledge of the provisions of the Natural Gas Act and/or the far-reaching ef-

[21] For the purpose of comparison, we take official notice of the two leases which are described in, and the subject of, the *Southland* decision: The Waddell lease dated July 14, 1925, begins on page 135 of the Joint Appendix filed therein in the United States Court of Appeals for the Fifth Circuit, and the Goldsmith lease, dated August 7, 1925, begins on page 293 thereof. Both leases appear to have been prepared on the same oil and gas lease form.

fect of the *Phillips* decision. The 1925 lessors in *Southland,* on the other hand, obviously could not have known that Congress would regulate the interstate aspects of natural gas some 13 years later.

31. The habendum clause which is common to the *Southland* leases describes them as extending

> ". . . for the term of Twelve (12) years from the date hereof and as much longer thereafter as oil or gas (or other minerals, if produced hereunder) are produced from said land. Provided, that this lease shall not remain in force longer than fifty (50) years from this date. . . ."

The leases are, therefore, life-of-the-reserve leases, such as are universal or almost universal in the natural gas industry today, but with outside fixed termination dates. The leases reached the Fifth Circuit in the context of those fixed termination dates, and its decision in *Southland* was prepared and issued in the same context.

32. The habendum clause of the 1967 Lease provides, on the other hand,

> "This lease shall remain in force for a term ending September 26, 1972, and as long thereafter as oil, gas, casinghead gas, casinghead gasoline or any of the products covered by this lease is or can be produced."

Since it does not have an outside fixed termination date, as in the case of the *Southland* leases, the 1967 Lease contemplates without question that certificated natural gas service from or attributable to the Southeast Quarter might continue indefinitely and, in any event, beyond the dates on which the lessors' interests might terminate or be transferred. It contemplates that no minerals covered by the lease of any economic consequence will remain in the ground at the time of its termination. And the primary or front-end termination date serves the obvious purpose,

not of limiting the duration of the estate created by the lease, but of inducing the tenant to commence an early realization of any productive potential of the Southeast Quarter. Such date poses a threat that if the tenant does not start producing royalties for the lessors within the specified period, the lessors will be free to permit some other tenant to do so. In combination with another provision discussed *infra* under which the tenant is required to pay rentals so long as the Southeast Quarter is not productive, it deters the tenant from permitting the acreage to lie "fallow". In these respects, the termination provision of the 1967 Lease differs from those of the *Southland* leases.

33. Furthermore, the 1967 Lease argumentively did not expire on September 26, 1972. By its terms it was to remain in force as long as natural gas, among other products, "can be produced". A gas well was completed into the Southwest Quarter on August 21, 1975, and the Southeast and Southwest Quarters were unitized with two other quarters to obviate the necessity of drilling offset wells to protect the owners other than those of the Southwest Quarter. The parties thereby assumed the existence of natural gas on an economic basis underlying the Southeast Quarter, and considering the length of time which is required for the formation of natural gas, there exists a rational basis for finding, as we do, that natural gas was capable of economic production from, or at least attributable to, the Southeast Quarter on September 26, 1972.

34. We would note, in this connection, that there is no limit to the number of pre-drilling rental payments discussed *infra* which are permissible, and that the payments which were apparently made to extend the life of the 1972 Lease from year to year could have been applied to extensions without interruption of the 1967 Lease. Amarex contends that the 1967 Lease *per se* was dedicated under the 1970 Gas Purchase Contract and, in the light of that contention, we find that the 1972 Lease should be treated as an extension of the 1967 Lease for the purpose of enforcing its obligation under the Natural Gas Act to maintain interstate natural gas service.

35. In keeping with the Supreme Court's views in *Phillips* that the jurisdiction of the Commission should not vary from state to state, depending upon state law, we believe that the statutory service obligation should not depend upon the construction under state law of an oil and gas lease, or upon the term of such a lease, or upon a question of whether such a lease is extended or replaced by a later lease. If the principle issue was correctly characterized in *Southland* as one of "property rights vs. regulatory powers", then the statutory service obligation should depend upon the extent to which Congress occupied the interstate commerce of natural gas and the supremacy of the Natural Gas Act over *any* inconsistent state law.[22]

36. The Supreme Court said in *Phillips*, in this connection, at page 682, that the Natural Gas Act gives the Commission jurisdiction over "all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company." In the context of the free or intrastate market for natural gas which, of course, did not exist as a material market force at the time of *Phillips*, we believe that any state regulation (including a court decision which is based on state law) which adversely affects

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[22] Speaking of the Natural Gas Act, the United States Court of Appeals for the Eighth Circuit said in *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F.2d 690 (1953), at page 705,

> "[T]here is no room for the exercise of any local power to obstruct or prevent the lawful functioning of the federal agency entrusted with the federal power of regulation. The federal power to regulate the commerce in natural gas derives directly from the construction and is, of course, the dominent power. To the extent that Congress has entered the field, exercised its power and authorized its Commission to regulate charges by natural gas companies for the gas they produce and sell in interstate commerce for resale, its mandate must prevail."

present or future volumes of natural gas in interstate commerce affects interstate "wholesales" of natural gas within the meaning of *Phillips,* including the price of that gas.

37. Our foregoing views are reinforced by the Supreme Court's decision in *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas,* 372 U.S. 84 (1963), overturning a state conservation measure which affected natural gas in place and, consequently, property rights to that gas, wherein the Supreme Court said with respect to the Natural Gas Act, at page 91:

> "The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, *Natural Gas Pipeline Co.* v. *Panoma Corp.,* 349 U.S. 44, or for State regulations which would indirectly achieve the same result. These state orders necessarily deal with matters which directly affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exclusive domain." (Footnote omitted).

And they are ultimately confirmed by *United Gas Improvement Co.* v. *Continental Oil Co., et al.,* 381 U.S. 392 (1965) (known as the Rayne Field case), wherein the Supreme Court confirmed the Commission's assertion of jurisdiction over a sale of natural gas in place, noting that state law did not recognize such a sale, and stating, at page 400, "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law."

38. In ratifying the Commission's long standing view with respect to the Section 7 obligation to continue service, the Supreme Court, in *Sunray, supra,* rationalized that producers, and pipelines, would otherwise be free to insist on

the inclusion in their certificates of provisions relieving them in advance of their obligations to continue service, thereby nullifying or seriously limiting the Commission's power to authorize abandonment under subsection (b). Such rationalization is applicable to the present situation because the 1967 Lease contains the following provision which, in its substance, is universal or almost universal in the natural gas industry:

> "If operations for the drilling of a well for oil or gas are not commenced on said land on or before the 26th day of September, 1968, this lease shall terminate as to both parties, unless the lessee shall on or before said date pay or tender to the lessor . . . the sum of [$160] which shall operate as a rental and cover the privilege of deferring the commencement of operations for drilling for a period of one year. In like manner and upon like payments or tenders, the commencement of operations for drilling may further be deferred for like periods successively."

It is obvious that if Amarex were to prevail, any producer with such a provision in an oil and gas lease could simply fail to make the next payment and thereby permit the lease to lapse within the year free of the prior commitment of the underlying gas to interstate service. And the producer might obtain a new lease of the acreage prior to that time and sell the production from or attributable to that new lease in intrastate commerce, thereby withdrawing dedicated gas from interstate commerce.

39. In rationalizing *Sunray, supra,* the Supreme Court also relied on the ratemaking scheme of the Natural Gas Act wherein a producer (or any other natural gas company) can file an *initial rate* under Section 4(c) subject to prospective change following an investigation under Section 5 and a finding that the rate is unjust and unreasonable. But the producer must file a *rate change* under Section 4(d), subject to suspension and refund following an investigation

under Section 4(e) and scrutinization under the "just and reasonable" standard. If Amarex were to prevail, all producers in its shoes would be in a position to withdraw dedicated gas from interstate service and redidicate it to the same or a different interstate customer if they could thereby obtain a higher price for the gas, and in doing so they could file new rates subject only to prospective change while escaping rate change scrutinization under the "just and reasonable" standard and a possible refund obligation. Or they might sell the gas at a higher rate in the intrastate market. The current "Contract Price Schedule" under the 1970 Gas Purchase Contract is $.21 per Mcf, subject to Btu and tax adjustments, and subject to any higher "just and reasonable" area rates prescribed by the Commission. Under the national rate prescribed by Opinion No. 770 issued July 27, 1976, the current maximum rate applicable to gas produced from the Cupp C No. 1 Well is $1.42 per Mcf, subject to adjustments.[23]

40. We find, therefore, that the considerations leading to the Supreme Court's decision in *Sunray* are equally applicable to the present situation. When natural gas reserves underlying acreage which is described in numerous oil and gas leases are dedicated to interstate commerce as part of the same gas purchase contract, as in the case of the reserves underlying the acreage described in the Exhibit A leases and mineral interest, limitations of capital, equipment and manpower naturally limit a producer's ability to

[23] Helmerich & Payne, Inc., the operator of the Cupp C No. 1 Well, informed a member of the staff on May 14, 1976, that the interstate sale to Michigan-Wisconsin Pipe Line Company was being made at the national rate and that the intrastate sale to Oklahoma Natural Gas Company was being made at a rate of $1.68 per Mcf. While such information comes from a reliable source, it is not part of the record in this proceeding and has not been relied upon in reaching our decision. Assuming its truth, however, it is obvious that Amarex would prefer to sell its share of the gas to Oklahoma Natural Gas Company at the intrastate rate of $1.68 per Mcf instead of Arkla at the interstate rate of $1.42 per Mcf.

bring all of the reserves into production immediately. And priority will naturally be given to the most likely prospects for returning profits. The simultaneous dedication of numerous reserves envisions a flow which will begin with a single well, enlarge as new wells are brought into production and gradually diminish as the wells age and abandonment is authorized. And effective administration of the Natural Gas Act requires continuous Federal control over those reserves from the moment of their dedication to the moment of their authorized abandonment, whether or not they are producing natural gas at any particular intervening point in time.

41. Section 7(b) of the Natural Gas Act requires the Commission's permission and approval for abandonments of facilities and service and, conversely, prohibits abandonments through the unilateral decisions of particular producers based upon the economic considerations affecting them. Economic decisions to rework natural gas wells in reservoirs which are currently producing or which have produced in the past are naturally interlocked in priority with similar decisions to drill new wells into reservoirs which have never produced. Accordingly, once a natural gas service is initiated under a gas purchase contract (as was done herein on November 4, 1971, under the 1970 Gas Purchase Contract), none of the reservoirs which are thereby "dedicated" to that service may be withdrawn therefrom on the basis of a producer's unilateral decision to drill a particular well at one site ahead of some other well at another site and before the expiration of the primary term of an oil and gas lease for that other site. See the Commission's Order Determining Gas Dedication issued September 29, 1976, in *Northern Natural Gas Company* v. *Crawford*, Docket No. CS71-6, and its Order on Rehearing issued December 1, 1976.[24]

[24] Appeal pending in the United States Court of Appeals for the Fifth Circuit *sub nom Harrison* v. *Federal Power Commission*, No. 76-4318.

42. Although Amarex contends that the obligation under Section 7 of the Natural Gas Act to continue the service would invade the integrity of State recording acts as being in the nature of an unrecorded encumbrance, we find that Amarex was advised of its Section 7 obligation in a title opinion issued in connection with the 1972 Lease even though apparently only the 1967 Lease had been recorded: [25]

> "By instrument dated June 6, 1970, Amarex, Inc. and Arkansas Louisiana Gas Company entered into a gas purchase contract covering the lease under consideration. The terms and conditions of the contract are not set forth in the instrument of record, but you are advised that any gas produced from the premises is subject to said contract."

And we find that the Section 7 obligation does not violate the public policy against perpetuities, as Amarex contends, because the obligation vests upon the initiation of the interstate service pursuant to the certificate.

[25] The opinion is dated May 17, 1972, more than three years before the issuance of the Commission's Opinion No. 737 in *El Paso, supra.*

Beneficiaries of certificated service might wish to consider recording copies of gas purchase contracts, as well as the underlying oil and gas leases, and Commission orders issuing certificates of public convenience and necessity, so that any prospective transferee of an interest in the affected real estate may be advised of the Section 7 obligation upon a proper title search.

THE MOTION FOR INTERIM RELIEF

43. On May 3, 1976, Amarex filed a motion seeking an order which would permit it to sell the natural gas in question to Arkla pendente lite under the 1970 Gas Purchase Contract, provided (1) such a sale *pendente lite* would not be an admission that the gas is covered by the contract or dedicated to Arkla in interstate commerce, (2) such a sale *pendente lite* would not operate as a dedication of the gas to interstate commerce and (3) Arkla would repay the gas in kind in the event that Amarex ultimately prevails. In other words, Amarex would sell the gas to Arkla under the terms of the 1970 Gas Purchase Contract so long as the *status quo* was maintained pending the outcome of this consolidated proceeding. Arkla, on May 17, 1976, filed an answer opposing the motion on the ground that the gas in question is dedicated to it under the 1970 Gas Purchase Contract and that it does not favor an interim arrangement with a repayment provision in view of its short supply. The Commission, as part of its order of July 15, 1976, denied Amarex's motion, and Amarex, on August 10, 1976, filed an application pursuant to Section 19(a) of the Natural Gas Act and §1.34 of the Commission's Rules of Practice and Procedure for rehearing of so much of that order as denied its motion to permit it to sell the gas to Arkla *pendente lite.* Thereafter, the Commission, by order issued September 9, 1976, granted rehearing for the purpose of further consideration.

44. Arkla refuses to purchase the gas from Amarex principally on the ground that it is opposed to a repayment requirement in the event of an ultimate determination that Arkla is not entitled to the gas, and it requests that it not be ordered to purchase the gas from Amarex. Amarex, on the other hand, has not asked for an order directing Arkla to purchase the gas, but only one permitting Amarex to sell the gas to Arkla while maintaining the *status quo pendente lite.* The Commission finds however, that Amarex's motion and application for rehearing are rendered moot by the action herein.

The Commission further finds:

The interest of Amarex, Inc. in the natural gas which is produced from or attributable to the Southeast Quarter in Section 22, Township 10N, Rang[illegible]W, Beckham County, Oklahoma, is committed to Arkansas Louisiana Gas Company for interstate sale for resale, by the small producer certificate of public convenience and necessity which was issued to Amarex, Inc., in Docket No. CS71-92 by the Commission's order in that docket of August 12, 1971, and by the subsequent initiation of natural gas service under the Gas Purchase Contract dated June 6, 1970, and the natural gas which is so committed cannot be withdrawn from such interstate service without the permission and approval of the Commission first had and obtained pursuant to Section 7(b) of the Natural Gas Act.

The Commission orders:

Commencing not later than sixty (60) days from the date of this opinion and order, Amarex, Inc., shall deliver or cause to be delivered to Arkansas Louisiana Gas Company, and Arkansas Louisiana Gas Company shall receive and take from Amarex, Inc., so much of the natural gas produced from the Helmerich & Payne Cupp "C" No. 1 Well, Beckham County, Oklahoma, from the completion thereof as a commercial producer of natural gas on August 21, 1975, forward, as is sold by Amarex, Inc., to Arkansas Louisiana Gas Company pursuant to the terms of the Gas Purchase Contract between them dated June 6, 1970.

By the Commission. Commissioner Watt, dissenting, filed a separate statement appended hereto.

(S E A L)

Kenneth F. Plumb,
Secretary.

Arkansas Louisiana Gas Company) Docket No. CP76-220
v.
Amarex, Inc.) Docket No. CI76-346

(Issued May 9, 1977)

WATT, Commissioner, *dissenting:*

I dissent to the attached opinion for the same reasons as I have indicated in my dissent in the Kerr-McGee Corporation, *et al.* case, Docket No. CI76-405, issued March 12, 1976.

(s) *James G. Watt*
Commissioner
